

REPORT

OF THE

COMMITTEE ON PATENT, TRADE-MARK AND COPYRIGHT LAW.

*(To be presented at the meeting of the American Bar Association,
at Boston, Mass., August, 1911.)*

To the American Bar Association:

The Committee on Patent, Trade-Mark and Copyright Law beg leave to submit the following report on the subject of the bill to create a United States Court of Patent Appeals.

At the time of our report submitted at the Chattanooga meeting the bill was pending in both branches of Congress. It had been crowded out of any chance of favorable consideration during the first session of the 61st Congress by the pendency of the bills to create the Customs Court and the Commerce Court. It was known (then) that the 62d Congress would be composed in large part of new members to whom the subject of a Court of Patent Appeals would be unfamiliar, and it was considered important to make a supreme effort to secure action on the bill during the short session which remained of the 61st Congress. This recommendation was approved by the Association and acted on by the committee. The bill had been considered and favorably reported by the Senate Committee on Patents, and it seemed to us that that end of the Capitol afforded the more hopeful field of endeavor; and we accordingly concentrated our efforts there. Upon the favorable report by the Committee on Patents the bill was referred by the Senate to its Judiciary Committee, and by that committee to a sub-committee of its own members. There was a hearing before the sub-committee which was attended by your committee and other friends of the bill. The oral discussions there presented were supplemented by written arguments and statistics and much personal work by members of the committee. One of us in particular haunted the Senate corridors for a week endeavoring to impress senators, and especially members of the Judiciary Committee, with the merits of the bill. The outcome was that the sub-committee reported to the

Judiciary Committee that there ought to be a court of final jurisdiction in patent causes, but that that end would be well enough met by conferring that jurisdiction on the Commerce Court. This report was not in writing, but was verbally communicated to the full committee. The Judiciary Committee concurred in this view, but made no formal report on the subject. We have understood that a bill was introduced at that session for a law along that line, but have not been able to verify the information by a copy of the bill. But a bill has been introduced in the Senate at the present session (Senate 2432, May 18, 1911) conferring on the Commerce Court in very brief terms final jurisdiction in all patent causes. It is impossible for your committee to advise the Association to accept such a disposition of the subject. The Commerce Court is not organized as an appellate court. It is a court of first instance created to take the place of the circuit courts in the disposition of questions arising under the interstate commerce law with appeals from its decisions direct to the Supreme Court. Nothing could be more incongruous than the jurisdiction which would be conferred upon it by making it the court of last resort in patent causes. The only possible excuse that can be offered for such a proposal is to save the expense of another court. But the most careful estimate that can be made shows that the work of the United States Court of Patent Appeals organized in the manner approved by the Bar Association will tax to the utmost the time and strength of the five judges who are to compose it. If the work the Commerce Court was organized to do will keep its five judges busy, the proposal is to try to make five judges do the work of ten. If the business of that court will not keep its judges occupied, the remedy is to lessen their number.

Another proposal of similar sort has come forward in a bill introduced in the House a few weeks ago (H. R. 9318, May 12, 1911) to vest final jurisdiction in patent causes in the Court of Appeals of the District of Columbia, to which similar objections apply.

That court was created eighteen years ago with three judges appointed for life to hear appeals in all sorts of cases from the

Supreme Court of the District of Columbia, to which was added the determination of appeals from decisions from the Commissioner of Patents in *exparte* and in interference cases. The pending bill proposes to add two more judges to its bench who are to be circuit judges of the United States designated by the Chief Justice of the Supreme Court to sit for six-year periods—one designation to be made every three years. As to those two judges the bill follows the scheme of our bill. The jurisdiction of the court, however, would be more heterogeneous than that proposed for the Commerce Court. It would embrace litigations of every kind that can arise in the District of Columbia and the Patent Office, with final jurisdiction in patent causes piled on top. Manifestly, the reasonable, sensible thing to do is to leave the Court of Appeals of the District of Columbia as it is, and add three more federal judges to the two provided for in the bill and make it a United States Court of Patent Appeals. In view of the vast interests involved in the administration of our patent laws the expense of providing the three additional judges is a wholly minor consideration.

Congress seems to be ready to give us everything except what we want. The discussion of the subject which has accompanied the movement inaugurated under the auspices of this Association to secure the creation of a single court of last resort in patent causes has brought about a widespread and insistent demand throughout the country for relief from the evils which attend our present system. The proposals to which we have referred and others like them are in response to that demand. But they are mere makeshifts. The patent system of our country is a great and important and permanent part of its jurisprudence. No more difficult task was ever put upon a court than will devolve upon a tribunal charged with the unification and reformation of the administration of our patent law. It is not a passing job for today or tomorrow, but a work for all time to come. The court, properly organized, will be as permanent and scarcely less important than the Supreme Court itself. We know that it will furnish from the first term of its sitting full employment for five judges. We have the judges perfectly equipped in every

respect to constitute the ablest patent court that ever sat, and our bill provides a simple and practical way to select them for their work. What reason or sense is there in going around the barn to find some other way of doing it? In the opinion of your committee there is nothing for the Association to do but to persevere along the lines which it has been following. That we shall succeed sooner or later is not to be doubted. Indeed, we are receiving a support now which, with proper efforts on our part, is bound to bring success soon. It is the general endorsement of our bill by manufacturers, manufacturing companies and trade associations of all kinds. If there is any request to which a member of Congress will and ought to listen with attention, it is from manufacturers and business men among his constituents. We have good hope to receive such strength of support from that quarter as will, added to the active efforts of the members of this Association, secure the passage of the bill at the next session of Congress.

It is gratifying to add that a bill to create a United States Court of Appeals substantially identical with the Association bill was lately introduced in the House by Mr. Sulzer, of New York, and referred to the Committee on Patents, where it is pending concurrently with the bill which we have mentioned, to vest final jurisdiction in patent causes in the Court of Appeals of the District of Columbia. It is H. R. 9843, introduced May 18, 1911. We do not expect that action will be taken on any of these bills before the assembling of the regular session, but to be sure on that point we will communicate with the committee to which they have been referred, and when we are advised that they are ready to hear from citizens on the subject we shall call loudly on the members of this Association to come to our aid. We owe to Mr. Sulzer our best efforts to assist him in the passage of his bill.

Respectfully submitted,

ROBERT S. TAYLOR,
ARTHUR STEUART,
FREDERICK P. FISH,
JOSEPH R. EDSON,
OTTO R. BARNETT.

NOTE.—We append a copy of Mr. Sulzer's bill now pending in the House as stated in the foregoing report. It is identical with the bill which your committee, with the approval of the Association, has been advocating before Congress, except that the salaries provided for the judges are lower than your committee has advised and we fear will be too low to induce the eminent judges who ought to compose the court to accept seats in it. But this is a feature which can be discussed as consideration of the bill proceeds.

A BILL

TO ESTABLISH A UNITED STATES COURT OF PATENT APPEALS, AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby created a United States Court of Patent Appeals, which shall consist of five judges, of whom four shall constitute a quorum, and shall be a court of record with jurisdiction as is hereinafter limited and established. Such court shall prescribe the form and style of its seal and the forms of its writs and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law. The President shall have power, by and with the consent of the Senate to appoint the marshal of the court, who shall have the same powers and perform the same duties under the regulations of the court as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. The court shall also appoint a clerk, who shall have the same powers and perform the same duties now possessed and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the marshal of the court shall be two thousand five hundred dollars a year, and the salary of the clerk shall be five thousand dollars a year, both to be paid monthly in twelve equal payments. The costs and fees now provided by law in the Supreme Court of the United States shall be the costs and fees in the United States Court of Patent Appeals; and the same shall be collected, expended, accounted for, and paid over to the Treasury Department of the United States in the same manner as is provided by law in respect to the costs

and fees in the Supreme Court of the United States. The court shall have power to establish all needful rules and regulations for the conduct of its business within its jurisdiction as conferred by law.

SEC. 2. That the President of the United States, by and with the advice and consent of the Senate, shall appoint a chief justice of said United States Court of Patent Appeals, and as vacancies occur shall in like manner appoint others to fill such vacancies from time to time. The acceptance of that office by a judge of the Circuit Court or District Court of the United States shall vacate his office as circuit or district judge.

SEC. 3. That upon the taking effect of this act the Chief Justice of the Supreme Court of the United States shall designate from among the judges of circuit and district courts of the United States four judges to sit as associate judges of the United States Court of Patent Appeals, two of them to sit for three years from the first day of the first term thereof, and two of them to sit for six years from the first day thereof, as associate judges of the same court. And after that, as the periods expire from which such designations shall have been made, the Chief Justice of the Supreme Court of the United States shall fill the vacancies thus occurring by designation of the same or other judges from among the judges of the circuit courts and the district courts of the United States, to sit for periods of six years each. In case of the death, resignation, or disability of any associate judge of the said court, or of his resignation of his seat in said court, the Chief Justice of the Supreme Court shall designate another judge of a Circuit Court or a District Court of the United States to sit for the unexpired period for which his predecessor had been designated. The designation of a judge of the Circuit or District Court of the United States to sit as associate judge of the United States Court of Patent Appeals must be with his consent, and his service in that court shall not vacate his office as judge of the Circuit Court or District Court, as the case may be.

SEC. 4. That a term of the United States Court of Patent Appeals shall be held annually at the city of Washington, be-

ginning on the second Monday of October in each year, and the same may be adjourned from time to time as the court shall order. If at any time for the meeting of the court a quorum of the judges shall not be present, the judges present may adjourn the court, and, if necessary, adjourn again from time to time until a quorum appear. If at any sitting of the court the Chief justice shall be absent, the associate judge senior in commission as Judge of the Circuit Court of the United States, or senior in age in case of commissions of even date, shall preside. If no judge of a Circuit Court shall be present, the associate judge senior in commission as a judge of a District Court of the United States, or senior in age in case of commissions of even date, shall preside. Until it shall be otherwise provided by Congress the sessions of the court shall be held in a building or rooms to be provided by the marshal of the District of Columbia under the direction and approval of the Attorney-General of the United States. The court shall by order authorize its marshal to employ such deputies and assistants for himself and the clerk of the court and such criers, bailiffs, and messengers as the business of the court shall require, and to pay the salaries of such employees at rates of compensation not exceeding those paid for similar services in the Supreme Court of the United States, and to pay all other necessary incidental expenses of the court. The Chief Justice and each of the associate judges shall be entitled to employ a clerk, whose salary, at a rate not exceeding that allowed the clerks of the Chief Justice and associate justices of the Supreme Court, shall be paid as part of the expenses of the court. The court shall have power, in its discretion, to appoint a reporter and to fix by order his salary or other compensation for a sum not to exceed three thousand dollars annually and direct the form and manner of the official publication of its decisions.

SEC. 5. That the Chief Justice of the United States Court of Patent Appeals shall receive a salary of ten thousand dollars per year. The circuit judges of the United States sitting as associate judges of the same court shall each receive the salary allowed him by law as a circuit judge, and in addition thereto, during the time of his service as associate judge of the United States Court

of Patent Appeals, but not longer, such additional sum as will make his entire compensation during that service nine thousand five hundred dollars per annum. The district judges sitting as associate judges of the United States Court of Patent Appeals shall each receive the salary allowed to him by law as district judge, and in addition thereto, during the term of his service as associate judge of the United States Court of Patent Appeals, but no longer, such additional sum as will make his entire compensation during that service nine thousand five hundred dollars per annum. All the said salaries shall be payable in twelve equal monthly installments. The time during which any judge shall serve in said court shall be deemed continuous service with that in any other court of the United States, before or after such service within the meaning and intent of section seven hundred and fourteen of the Revised Statutes. The additional compensation received by a circuit or district judge while sitting as associate judge of the United States Court of Patent Appeals shall not be taken into account in determining the amount to be received by him after retirement.

SEC. 6. That the United States Court of Patent Appeals shall have jurisdiction to hear and determine appeals and writs of error from final judgments and decrees in the Circuit Courts of the United States in cases arising under the laws of the United States relating to patents for inventions, and from final judgments and decrees in cases arising under the laws of the United States relating to patents for inventions rendered by any other court having jurisdiction under the laws of the United States to hear and decide such cases in the first instance :

Provided, however, That it shall have no jurisdiction in cases originating in the Court of Claims. All such appeals shall be taken within six months after the entry of the order, judgment, or decree sought to be reviewed. The practice, procedure, and forms to be observed in the taking, hearing, and determination of such appeals and writs of error shall conform to the practice, procedure, and forms observed in like cases in the Supreme Court of the United States, subject to such rules and regulations as shall be prescribed by the court.

SEC. 7. That whenever, by an interlocutory order or decree in a Circuit Court of the United States, or other court having jurisdiction under the laws of the United States to hear and decide in the first instance cases arising under the patent laws, in a case in which an appeal may be taken from the final decree of such court to the United States Court of Patent Appeals, an injunction or restraining order shall be granted, or refused, or continued, or vacated, or modified, or retained without modification after motion to modify the same, an appeal may be taken from such order or decree by the party aggrieved to the United States Court of Patent Appeals: *Provided*, That the appeal must be taken within thirty days from the service of the notice of entry of such order or decree; and it shall take precedence in the Appellate Court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the United States Court of Patent Appeals, or a judge thereof, during the pendency of such appeal.

SEC. 8. That the Chief Justice and the associate judges of the United States Court of Patent Appeals shall each exercise the same powers in term and vacation in the allowance of appeals, supersedeas orders, and other matters incidental to the jurisdiction and business of the court as are now exercised by the Chief Justice and associate justices of the Supreme Court of the United States in relation to the business and jurisdiction of that court.

SEC. 9. The decisions of the United States Court of Patent Appeals in all cases within its appellate jurisdiction shall be final, except that it shall be competent for the Supreme Court of the United States to require, by certiorari or otherwise, any such case to be certified to it for its review and determination, with the same power and authority in the case as though it had been carried by appeal or writ of error from the trial court directly to the Supreme Court.

SEC. 10. That whenever any case shall have been certified from the United States Court of Patent Appeals to the Supreme Court of the United States, by certiorari or otherwise, it shall be, upon its determination by the Supreme Court, remanded to the

Circuit Court of the United States or other court in which it originated for further proceedings to be taken in pursuance of such determination. And in every case determined by the United States Court of Patent Appeals upon appeal or writ of error the case shall be remanded to the Circuit Court of the United States, or other court from whence it came, for further proceedings to be taken in pursuance of such determination.

SEC. 11. That all appeals and writs of error in cases in which appellate jurisdiction is by this act conferred upon the United States Court of Patent Appeals which shall have been pending without hearing in the United States Circuit Courts of Appeals or other courts of appellate jurisdiction for less than three calendar months prior to the taking effect of this act shall be transferred from such Circuit Court of Appeals or other courts to the United States Court of Patent Appeals and be heard and determined in that court as though they had been taken there from the trial courts by appeal or writ of error, without further payment for certifying the record or any new or additional docket or calendar fees; all other appeals and writs of error in cases in which appellate jurisdiction is by this act conferred upon the United States Court of Patent Appeals which shall be pending in the United States Circuit Courts of Appeals or other courts of appellate jurisdiction at the time of the taking effect of this act shall remain and be heard and determined by the courts in which they may be pending, respectively, as though this act had not been passed.

SEC. 12. That after the taking effect of this act no appeal or writ of error shall be taken from any Circuit Court or other court of the United States to any United States Circuit Court of Appeals or other Appellate Court in any case in which an appeal or writ of error may be taken to the United States Court of Patent Appeals under the provisions of this act.

SEC. 13. That all laws and parts of laws inconsistent with the provisions of this act are hereby repealed.

SEC. 14. That this act shall take effect and be in force six months after its enactment.